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IN THE

Supreme Court of the United States

October Term, 1962

No. 512

BRADLEY REED SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

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IN THE

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No.....

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PEOPLE OF THE STATE OF CALIFORNIA,

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Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above-entitled case on October 24, 1962.

Opinions Below.

The opinion and judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles [C. T. 109-117][1] is unreported. A copy of the said opinion and judgment is attached hereto as Appendix A.

[1]The reference "C. T." is to the transcript of the record prepared and certified by the clerk of the court below.

Jurisdiction.

The judgment of the court below [C. T. 114] was dated and entered on October 24, 1962. By order of Mr. Justice Douglas dated January 11, 1963, the time to file this petition for writ of certiorari was extended to and including February 13, 1963.

On October 24, 1962, the same date as the rendition of its opinion, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles made and entered an order in the case entitled: Order Certifying Cause to District Court of Appeal [C. T. 118]. Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*,[2] Rule 63. A copy of the said Order is attached hereto as Appendix B.

On November 15, 1962, the District Court of Appeal of the State of California for the Second Appellate District, Division Three, made and entered an order in the case entitled: Order Denying Transfer on Certification, the Honorable Gordon L. Files, a Judge of said Court, voting to grant transfer [C. T. 119]. Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*, Rule 62. A copy of the said Order is attached hereto as Appendix C.

The decision of the aforesaid District Court of Appeal denying transfer in the case herein became final immediately upon its filing on November 15, 1962. Calif. Rules of Court, *Appellate Rules*, Rule 24(a). The

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[2]Adopted by the Judicial Council of the State of California, effective January 2, 1962.

California Supreme Court did not order the cause transferred to itself on its own motion within thirty days after the said decision became final (Calif. Rules of Court, *Appellate Rules*, Rule 28(a)), and a petition for hearing in the California Supreme Court "may not be filed after denial of a transfer to a District Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court" (*Id.*, Rule 28(b)).

By the aforesaid denial of transfer, therefore, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. Calif. Constitution, Article VI, §§ 4, 4b, 4e, 5; Calif. Penal Code 1471; Calif. Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals*, Rule 61 *et seq.*; Calif. Rules of Court, *Appellate Rules*, Rules 24(a), 28(a), 28(b). *Smith v. California*, 361 U. S. 147, 148, fn. 2; *Virginia Ry. Co. v. Mullins*, 271 U. S. 220, 222.[3]

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since the validity of a state statute on grounds of repugnancy to the Constitution of the United States was and is drawn in question and rights, privileges and immunities were and are specially set up and claimed under the Constitution of the United States.

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[3]See also, 36 Cal. S. Bar J. 890-907 (1961); 37 Cal. S. Bar J. 265-266 (1962).

Questions Presented.

1. Whether the sale of *Tropic of Cancer* by Henry Miller is not protected against criminal punishment by the guarantees of free expression afforded by the First and Fourteenth Amendments.

2. Whether California Penal Code 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, deprives petitioner of liberty of speech and press without due process of law contrary to the free speech and press provisions of the First Amendment subsumed into the due process clause of the Fourteenth Amendment as a limitation on state action.

3. Whether California Penal Code 311.2, as construed and applied to the sale of *Tropic of Cancer* by petitioner, fails to provide reasonably ascertainable standards of guilt and therefore deprives petitioner of his liberty without due process of law contrary to the due process provision of the Fourteenth Amendment.

4. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of Cancer* by petitioner because deemed to be utterly without redeeming social importance to the "average person" in the "Los Angeles community," abridges the freedoms of speech and press and deprives petitioner of his liberty without due process of law and denies petitioner the equal protection of the laws contrary to the free speech and press, due process and equal protection provisions of the First and Fourteenth Amendments.

5. Whether California Penal Code 311.2, as construed and applied to punish the sale of *Tropic of Cancer*, the dominant theme of the said book, taken as a

whole, not appealing to prurient interest nor going beyond contemporary community standards in the description of sex, and believed by petitioner to have ideas of redeeming social importance and therefore not obscene, deprives petitioner of liberty of speech and press and permits petitioner's conviction without evidence of guilt contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

6. Whether the rulings and the instructions of the trial court, and refusal to instruct, with respect to the standards for judging the alleged obscenity of *Tropic of Cancer*, upheld by the court below, deprived petitioner of his liberty without due process of law contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the provisions of California Penal Code 311 and 311.2 are set forth in Appendix D attached hereto.

Statement of the Case.

(a) In a complaint [C. T. 2] filed in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, petitioner, a bookseller [C. T. 138-139] was charged with a violation of California Penal Code 311.2. It was alleged that on or about October 9, 1961 in the City and County of Los Angeles, the petitioner did knowingly exhibit and distribute "obscene matter, to wit: the book 'Tropic of Cancer,' by Henry Miller." The cause came on for trial before Honorable Kenneth L. Holaday, a Judge of the said Municipal Court, and a jury [C. T. 126, 138].

How Federal Questions Are Presented.

(b) The court below rejected petitioner's argument that "the book 'cannot constitutionally be held obscene' under the code 'in the light of the guarantees' of the United States and California Constitutions" (Appendix A p. 1). The court below held that the trial court had properly instructed the jury on the meaning of obscenity "as determined by the California and United State Supreme Courts" (Appendix A p. 2).

Referring to this Court's opinions in *Times Film Corp., Sunshine Book Co., One, Inc., Kingsley* and *Manual Enterprises, Inc.*, cited by petitioner, the court below held that these decisions "do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced" (Appendix A p. 4). The court held that the book, under the standards enunciated in *"Roth v. United States (Alberts v. California)* 354 U. S. 476, 1 L. Ed. 2d 1498" (Appendix A p. 5) has not "the slightest tendency to show some social importance" and "lacks anything in the slightest redeeming" (Appendix A p. 6).

The court below held that if the court were to substitute its independent judgment "in favor of the free speech and press guarantee" (Appendix A p. 6), the court would be depriving the People of the right to a jury trial in a criminal case (Appendix A p. 6). The court concluded that petitioner had been properly convicted by the jury "under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land" (Appendix A p. 7).

The questions of the right of the petitioner to exhibit and distribute *Tropic of Cancer* as guaranteed

by the free speech and press and due process provisions of the First and Fourteenth Amendments and the invalidity of California Penal Code 311.2 under the First and Fourteenth Amendments as construed and applied to the petitioner and the sale of *Tropic*, were detailed in petitioner's Statement on Appeal [C. T. 10-14] to the court below.

The extensive trial was made up largely of testimony of witnesses offered by the People [C. T. 568, 660, 758, 800, 912, 951, 983, 1027, 1996, 2146, 2231, 2251, 2289, 2350, 2425, 2524, 2735], and by petitioner [C. T. 678, 860, 1081, 1108, 1160, 1276, 1304, 1364, 1460, 1589, 1613, 1648, 1725, 1744, 1930, 1940, 1944, 2565, 2683, 2780], with respect to whether or not the book is non-obscene and has redeeming social importance. The question of the right of petitioner to distribute *Tropic of Cancer*, and the protections afforded *Tropic*, under the First and Fourteenth Amendments were raised by various motions, arguments and objections to testimony throughout the trial, *e.g.* [C. T. 144, 145, 516-518, 600-602, 1023-1026, 1730-1736], and by requests for instructions, which were not given [C. T. 61, 62, 64, 65, 67, 68, 73, 74, 85, 88, 89-97, 103-105]. Further details of the federal questions raised at the trial, and record references thereto, are contained in the ensuing discussion in Reasons Relied on for Granting the Writ, *infra*.

(c) The jury returned a verdict of guilty [C. T. 106] The judgment and order of the trial court was probation for a period of one year, the first 30 days of the probationary term to be served in the city jail [C. T. 30]. The appeal to the Appellate Department of the Superior Court of the State of California for

the County of Los Angeles and the denial of transfer by the District Court of Appeal for the Second Appellate District, Division Three[4] followed thereafter as aforestated.

Reasons for Granting the Writ.

1. The primary issue involved in this case is whether the book *Tropic of Cancer* by Henry Miller is entitled to the protections of the First Amendment made applicable to the States by the due process provisions of the Fourteenth Amendment.

The Federal Government has conceded that *Tropic* is constitutionally protected by dropping efforts to prevent its importation into the United States[5] and by lifting the Post Office ban on the book.[6]

The Supreme Judicial Court of Massachusetts, resting its decision "squarely on the First Amendment" decided that *Tropic of Cancer* "cannot constitutionally be held to be obscene" under state law. *Attorney General v. The Book Named "Tropic of Cancer"*, 184 N. E. 2d 328, 335 (1962). The majority concluded that Tropic could not be suppressed because the book has

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[4]In a civil suit for declaratory judgment. Division One of the District Court of Appeal for the Second Appellate District held that *Tropic* is obscene under the state obscenity statute, and upheld the action of a trial court sustaining a demurrer to the complaint. *Zeitlin v. Arnebergh*, 211 A. C. A. 31, 27 Cal. Rptr. 320 (1962).

[5]A copy of the decree of the United States District Court for the Eastern District of New York in *United States v. Three Books, alleged by the Customs Authorities to be obscene, entitled "Tropic of Cancer," "Tropic of Capricorn" and "Plexus,"* dismissing the libel on motion of the United States is attached hereto as Appendix E.

[6]A copy of the story by the New York Times of June 14, 1961, reporting the action taken by the Post Office Department on the advice of the Justice Department is attached hereto as Appendix F.

"serious purpose;" is regarded by a significant segment of the literary world as a book of "literary importance;" the predominant effect and purpose of the book as a whole is "not prurient;" and the writing must be accepted as "a conscious effort to create a work of literary art" and as having "significance." 184 N. E. 2d at 334.

The judgment of the court below is directly in conflict with the aforesaid federal and state constructions of the fundamental law and, it is submitted, with applicable decisions of this Court. The California court decided that the free speech and press guarantees of the United States Constitution are not available to *Tropic of Cancer*, and that criminal sanctions may validly be imposed upon a bookseller for selling the book.

If Tropic of Cancer is not obscene in the constitutional sense there is no valid state power to punish its dissemination. *Smith v. California*, 361 U. S. 147, 152. Mr. Justice Frankfurter, concurring in *Marsh v. Alabama*, 326 U. S. 501, 511, stated: "Where the First Amendment applies, it is a denial of all governmental power in our Federal System." See also, *Alberts v. California*, 354 U. S. 476, 492, fn. 31.

2. It is respectfully submitted that a substantial federal question is here presented. Henry Miller's *Tropic of Cancer* is manifestly a serious work of literature, expresses ideas of social importance, and occupies an important position in twentieth century literature. Since the date of its first publication more than a quarter of a century ago,[7] the book has been praised by quali-

[7]The book was first published in France by the Obelisk Press in 1934. It was published in Prague in 1938. In 1945 and 1947, two separate editions were published in Paris by French pub-

fied critics, writers and scholars. The literary and social importance of *Tropic* has been affirmed by such eminent persons as T. S. Eliot, Norman Cousins, Aldous Huxley, Sir Herbert Read, Harry Ashmore, Eugene Burdick, John Ciardi, Wallace Fowlie, Sir Osbert Sitwell, Philip Rahv, to select only a few distinguished names out of a host of American and world figures.[8]

Tropic of Cancer was the first published work of Henry Miller. Since 1934 he has written over thirty books, and a score of brochures, pamphlets and miscellaneous material. See, *The Henry Miller Reader* (1959), 395-397; Baxter, *Henry Miller, Expatriate* (1961), 191-201.[9]

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lishers. In 1952 a German edition was published; in 1953 a Danish edition. In 1953 and 1954, an English and Japanese edition, respectively, were published in Tokyo. A Swedish edition was published in 1955. Perles, *My Friend Henry Miller* (1956). The edition here involved was published by Grove Press, Inc. in New York in 1961. An Italian edition was published in 1962, and an edition in Hebrew was published the same year in Israel. University of California at Los Angeles, Special Collections, *Henry Miller Collection.*

[8]In Appendix G there are set forth the signatories to a Statement, *Support of the Freedom to Read*, issued after the opinion and ruling of the Hon. Samuel B. Epstein, Chief Judge of the Superior Court of Cook County on February 21, 1962, enjoining local officials from interfering with the sale of the book. *Haiman v. Morris*, No. 615, 19718. The statement and signatures appear in 6 Evergreen Review, July-August, 1962.

[9]Appendix H contains a bibliography of the books written by Miller. There are almost 500 magazines and periodicals from all parts of the world in the Henry Miller Collection in the Special Collections Department of the University of California at Los Angeles Library. [9]This body of commentary on Miller, his life, literary stature and philosophical outlook comes from such diverse areas of the world as Belgium, Brazil, Canada, Cyprus, England, Egypt, France, Finland, Germany, Holland, India, Israel, Italy, Ireland, Japan, Mexico, Norway, Philippines, Poland, Russia, Scotland, Spain, Sweden, Switzerland, Tunisia and the United States. The Library has Miller's correspondence

When Tropic of Cancer was published by Grove Press, Inc. in 1961, the critics and reviewers throughout the country were substantially agreed on the importance of the work, "the first chapter in the 'single, endless, autobiography' that has been his [Miller's] life's work." Maurice Dolbier, *New York Herald Tribune*, June 24, 1961. John Ciardi, The American Poet, observed: "'Tropic of Cancer' must be defended not as an ultimate peak of greatness, but because, whether it succeeds or fails, it is written with power and compassion, and because it is charged in every passage with the author's aesthetic devotion to his form and with his humane devotion of the joy of life. To remove such a book from the experience of mature readers on the grounds that the prurient may use it abusively is an assault upon the aesthetic experience. It is a denial of freedom on the queasy grounds that men are not fit for freedom. It is to say that the least of men shall dictate the diet of the rest." *Saturday Review*, June 30, 1962.[10]

Inquiry at the leading universities of the country reveals that "familiarity with the works of Miller is typically part of the general background of the teacher of modern English." Paul and Schwartz, *Federal Censorship, Obscenity in the Mails* (1961), 128, fn. 2.[11]

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amounting to some 14,000 letters with such figures as Count Keyserling, Ferdinand Leger, J. C. Powys, Wallace Fowlie and many others. See also, Lawrence Durrell—Henry Miller, *A Private Correspondence* (1963).

[10]Appendix I contains excerpts of reviews by Dorothy Parker, *Esquire*, September, 1961; Ben Ray Redman, *Saturday Review*, June 24, 1961; Eric Moon, *Library Journal*, June 18, 1961; Harry T. Moore, *New York Times Book Review*, June 18, 1961; Terry Southern, *The Nation*, November 18, 1961.

[11]See, Richard E. Baxter, *Henry Miller: An Evaluation* (1953), Master of Arts Thesis, Cornell University; Bosley, D. Brotman, *Dionysus, A Critical Interpretation of Henry Miller*

Bibliographies on American Literature include discussions of Miller's writings. Kunitz & Haycroft, *Twentieth Century Authors, A Bibliographical Dictionary of Modern Literature* (1942), 960-961. Library of Congress, *Guide to the Study of the United States of America, Representative Books Reflecting the Development of American Life and Thought* (1960) 131. In 1952, Brewster Ghiselin, Professor of English at the University of Utah, edited an anthology entitled *The Creative Process* in which "thirty-eight of the world's outstanding men and women reveal how they actually begin and complete creative work in such fields as art, literature and science." There are extracts from the writings of Henry Miller, as well as Einstein, Mozart, Van Gogh, Wordsworth, Yeats, James, Wolfe, Jung, Herbert Spencer and others.

Henry Miller is a member of the National Institute of Arts and Letters, an organization incorporated by act of Congress in 1913, dedicated to the furtherance of literature and the fine arts. "Its membership is limited to 250 native or naturalized citizens qualified by notable achievements in art, literature or music." See, *Information Please Almanac* (1963) 220-221, setting forth the complete list of distinguished members, including members of the Academy of Arts and Sciences, an affiliate of the Institute.

3. In assessing the "social importance" of *Tropic of Cancer* by Henry Miller, it is necessary to consider the

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(1951), Master of Arts Thesis, Columbia University; David W. Griffin, *The Possibility of Joy: Henry Miller's Place in the American Tradition* (1951), Master of Arts Thesis, Columbia University. Baxter, *Henry Miller, Expatriate* (1961); University of California at Los Angeles Library, Henry Miller Collection.

literary traditions, the nature and character of the arts, and the philosophy, indeed—the entire environment and setting in America and Europe during the first half of the twentieth century—out of which the writer and the book emerged. Henry Miller was born in New York in 1891. His writing career, begun in the 1920's, was always accompanied by great poverty. It was at the depth of the depression when Miller, virtually penniless, left the United States for Paris, and it was in Paris in 1932 that he began the writing of *Tropic of Cancer*.[12] Taking "the broadest view of the creative process which makes of the artist nothing more than an instrument," Miller himself has stated, "the spirit of the age is the crucible in which, through one means or another, certain vital and mysterious forces seek expression." *Remember to Remember* (1947) 280.

The anxieties and dilemmas that arise in man's quest for identity and for meaning in life are exemplified by the "expatriate" or "exile" in American literary history. A sense of alienation and isolation from their environment in the last half of the Nineteenth Century led Poe, Emily Dickinson, Thoreau and Whitman to become "spiritual" exiles at home. Stephen Crane, Bret Harte and Henry Adams took temporary leave of the country. Henry James, Whistler and Lafcadio Hearn left permanently. The aftermath of World War I brought a post war generation disillusioned with the old material standards of success, conventionality in manners, and the genteel tradition. F. Scott Fitzgerald and Hemingway departed for Europe to "live on

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[12]The original manuscript, many times reworked by the author, was three times the size of the book which was published in Paris in 1934. *The Henry Miller Reader* (1950) 383-385.

a profounder level of experience" and to obtain "a new psychological freedom". Baxter, *Henry Miller, Expatriate* (1961), 4.

The 1930's, a period of economic upheaval and social ferment, found some writers turning to new faiths and movements which made emigration from the homeland less desirable. Others, like Henry Miller, found little meaning in the political or social movements of the day; they belonged to no cult of disenchantment. The expatriate of the 1930's was an isolated figure, searching for fulfillment on his own terms. Man "must fend for himself, and with the aid of his own limited intelligence find his way about an indifferent universe." Becker, *The Heavenly City of the Eighteenth Century Philosophers* (1932) 15.

Moreover, in the early twentieth century, movements in art and literature in Europe had begun to build up the language of the subconscious as the truer expression of the individual. Freud, Jung and Bergson, among others, were emphasizing that an enormously complicated and largely unconscious inner world existed within each individual.[13] Writers like Virginia Woolf and James Joyce stressed that outer reality was a part of the drama of the inner life, that man as a conscious human being is the product of his inner impulses and the external stimuli of the outer world. Humphrey, *Stream of Consciousness in the Modern Novel* (1954) 21-22. For such writers, some kind of pattern in lieu of the familiar "plot" had to be super-

[13]"If a man were to attain his full stature as an individual it would seem that he must acquire some philosophy of life, some view as to the meaning of his own existence. As Jung himself said: 'Man cannot stand a meaningless life.'" Storr, C. J. Jung in *The American Scholar* (Summer 1962) 402.

imposed on the "chaotic materials" of inner states of consciousness. New unities were devised in writing, and complex symbolic structures were created, of which Joyce's *Ulysses* and *Finnegan's Wake* are only two examples.

Emerson, Thoreau and Whitman had emphasized "the self" in their writings, the search for identity through expression. Whitman was determined to "utterly escape and defy the world's attempt to impose upon him this or that conventional identity." Chase, *Walt Whitman Reconsidered* (1955) 51. In the early twentieth century, the typical American artist, in this tradition, sought experience of any kind; experience wrote "its own ticket," carrying the artist to its own chance or casual destination. This was the spirit of Mark Twain in *Huck Finn*, of Sherwood Anderson in *Winesburg, Ohio*, of Henry James in *The Ambassadors*, of the "lost generation" of the twenties who rushed into Paris in order, as Fitzgerald put it, to "experience Paris." Self-liberation through actual and genuine experience was the theme, and the stream of consciousness technique developing in the writings of Dreiser, Farrell, Anderson and Faulkner was the literary device for making the private world public while still maintaining the quality of privacy.

4. *Tropic of Cancer* reflects many of the influences of the traditions discussed above. Miller states that he began his writing career by imitating "every style in the hope of finding the growing secret of how to write." *The Wisdom of the Heart* (1941) 20-21. There is no doubt that he examined the style and technique of every writer whom he admired. See, *The Books in My Life* (1952). But before *Tropic of Can-*

cer all his efforts had been in vain. He states that he failed "because there was no divorce between myself as writer and myself as man." *The Wisdom of the Heart, supra,* 20. Only when he threw "everything overboard" did he begin to hear his "own voice . . . a separate, distinct unique voice." He states: "My life itself became a work of art" *Id.,* 20-21. In his break with America in 1930, and the transferral of his life to Paris, Miller saw himself as a piece of matter detached "from the sun to live as a wholly new creation." He had himself become a "blazing sun," and like all other suns, he had to nourish himself "from within." Stated Miller: "Like it or not I was obliged to create a new life for myself. And this new life I feel is mine, absolutely mine, to use or to smash, as I see fit." Miller, *The Cosmological Eye* (1939) 2.

Thus, *Tropic of Cancer* is the description of an individual in the process of excitedly discovering a cosmology, a view of the universe derived by the individual out of the interpretation of his own experiences[14] It is not surprising that such a book takes the form of a journal, a chronicle of a man's days. Nor is the journal by any means a new literary form; it was well embedded in the European tradition, as, for example, La Rochefoucauld's *Maxims,* Rousseau's *Confessions* and St. Augustine's *Confessions.* All of these writers were concerned with detailing as candidly and

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[14]The importance of such search and discovery in a mass society is exemplified in many writings. See *Identity and Anxiety,* edited by Maurice Stein, Arthur J. Vidich and David M. White (1960); Brinton, *The Fate of Man* (1961); Riesman, *The Lonely Crowd* (1961); Arendt, *The Human Condition* (1958); Erickson, *Childhood and Society* (1950); Fromm, *The Sane Society* (1955).

explicitly as possible the personal experiences of their lives.

To this "journal," this seemingly formless record of impressions, experiences, thoughts and ideas, Miller brings the unity of a developing personality, a vision of his growing cosmology. The book is the description of an individual "consciousness," and Miller creates the unity of a piece of art by employing the stream of consciousness techniques of Joyce and Woolf, and, at one and the same time, the psychoanalytic technique of "free association" in the form of "interior monologues." Thus, by using the first person narrative, Miller will at times in *Tropic* turn off the flow of "the stream" of consciousness, in order by free association to focus on and elaborate one specific idea—and then return to let the stream of consciousness flow again.

5. The journal consists of some 17 episodes of varying lengths, each episode consisting of one, two, or at the most, three incidents. Except for episodes of purely local color, they all consist of a consistent pattern: the recital of an experience or series of experiences, and the ideas and images arising out of these experiences. As the stream of consciousness flows, Miller dams the stream at different times to discuss in terms of word images significant life problems and his philosophic difficulties with respect to them. These include images of death, putrefaction, disease, birth and rebirth, identity and self, the machine, sex, the East, the discrepancy between thought and action. These images and discussions also perform the function of tying the episodes in the book together, as well as acting as breaks in the flow of consciousness; they serve both as literary and psychological devices.

The artistic form of *Tropic of Cancer* is complicated and diffuse. While certain persons including members of the Court below may be able to see little more than "putrid paragraphs" of a "moral derelict" and "social dissenter," the work's important virtues, both ideological and artistic, are evident to many others. In view of this wide conflict, we feel obliged to offer here a somewhat extended analysis of the book's artistic and ideological form.

The first episode is in the form of an introduction because it recapitulates the immediate past and also resembles the train of thought of a man just emerging into consciousness. In a subtle form, we are presented at the outset with a sense of birth: "I have no money, no resources, no hopes. I am the happiest man alive. A year ago, six months ago, I thought that I was an artist. I no longer think about it, I *am*. Everything that was literature has fallen from me. There are no more books to be written, Thank God" [*Tropic of Cancer*, Peo. Ex. 4, C. T. 472-478, p. 1].

The disparity between thought and action has been overcome, Miller asserts. He has found a voice, unencumbered by the stereotypes foisted by the conventions of society upon an artist.

On the other hand, there is death to remember: "We are all alone here and we are dead" (1). Thus the book begins also with loneliness and death, just as it will end in identification with humanity and a vision of life everlasting through that identification (318).

The author's thoughts next jump to images of disillusion, disease and rebirth: "The world around me is dissolving . . . the world is a cancer eating itself . . .

when into the womb of time everything is again withdrawn chaos will be restored and chaos is the score upon which reality is written . . . I am still alive, kicking in your womb, a reality to write upon" (2).

But this rejection and contemplated transfiguration of society, so characteristic of Whitman's writing and American writing in general, is also accompanied with enormous and bubbling egotism: "This then? This is not a book. This is libel, slander, defamation of character. This is not a book in the ordinary sense of the word. No, this is a prolonged insult, a gob of spit in the face of Art, a kick in the pants to God, Man, Destiny, Time, Love, Beauty . . . what you will. I am going to sing for you, . . ." (2).

What emerges from the book's introduction is the idea that Miller is an awakening man, one who is "singing" a song of himself. From that point on, using the stream of consciousness technique, free association, surrealist symbols, Miller moves in all directions searching for an identity, his true self, trying to discover himself outside a stagnating society which includes Europe as well as America. He states that one can "rot" in Europe (49), but he is content to be "a zero" in Paris (150) because it shows that he can live without the disease and corruption of civilization. "I haven't any allegiance, any responsibilities, any hatreds, worries, any prejudices, any passion. I'm neither for nor against. I'm neutral" (153).

His experience with the paintings of the French artist Matisse (162-166) was directly applicable and of deep significance for Miller. He finds a kinship with Matisse. "Behind the minutiae, the chaos, the

mockery of life, he detects the invisible pattern . . . no searching for formulae . . . Even as the world goes smash there is one man who remains at the core, . . . as the process of dissolution quickens" (164).

Then Miller, if stirred by this stream of thought compares the world to the image of a frozen, decaying, broken wheel, concluding by the statement: "At the very hub of this wheel which is falling apart, is Matisse." (165).

These images in turn lead to further musing and "interior monologue." Only through laying bare a disease, only through experience, Miller thinks, can a person perhaps achieve a rebirth of the self. "To fathom the new reality it is first necessary to dismantle the drains, to lay open the gangrened ducts which compose the genito-urinary system that supplies the excreta of art . . . The drains are clogged with strangled embryos" (165).

Thus it is that the moments of greatest self-insight come in the midst of peculiarly passionless and degrading scenes in brothels. Prior images and memories seem to pour out when the "hub of the wheel" is reached, and at these moments all that occurred previously seems to become an organic unity as the narrator approaches self-understanding at a higher level. "A glance at that dark, unstitched wound and a deep fissure in my brain opens up: all the images and memories that had been laboriously or absent-mindedly assorted, labeled, documented, filed, sealed and stamped break forth pell-mell like ants pouring out of a crack in the sidewalk; the world ceases to revolve, time stops, the very nexus of my dreams is broken and dissolved and my

guts spill out in a grand schizophrenic rush, an evacuation that leaves me face to face wtih the absolute" (246-247).

The world of the 1930's seems passionless, cold, material. It can no longer be patched up or repaired. Even at the lowest depths, all is cancerous. There appears to be no escape from the "self" imposed by society (246-252).

But there is for Miller suddenly a glimpse of something affirmative, a meaning to life which has undoubted currency today. The highest aim of man should not be to be "human," that is, to belong to "men and governments" (254). "Today I am proud to say that I am inhuman, that I belong not to men and governments, that I have nothing to do with creeds and principles . . . I belong to the earth! . . . [with] the race of artists who, goaded by unknown impulses, take the lifeless mass of humanity and by the fever and ferment with which they involve it turn this soggy dough into bread and the bread into wine and the wine into song . . . If I am inhuman it is because my world has slopped over its human bounds . . . It may be that we are doomed, . . . but if that is so then let us set up a last agonizing, bloodcurdling howl, a screech of defiance, a war whoop! . . . Let us living ones dance about the rim of the crater, a last expiring dance. But a dance!" (254-257).

Tropic of Cancer is a "journal" only. The book does not end the record of Miller's search; it simply "leaves off." Thus, Miller follows episodes of deepest insight and affirmation, with such final episodes as the Dijon employment as a teacher. Here is an episode, devoid of the joy of the preceding passages. Its predominant images are cold; the seas are filled with waste and

rotting effluvia. There is nothing but disillusion in the strait-jacket role of teacher which society has imposed upon him. His interior monologues are those of despair. "You drift around like that for years and years, until you find yourself in the dead center, and there you slowly rot, slowly crumble to pieces, get dispersed again. Only your name remains" (287).

So the chronicle comes to a close, as if Miller is reluctant to leave the reader with any intervening illusion which will prevent the reader from standing face to face with reality. Yet the very last page of the book finds Miller reiterating the dominant theme of his journal: Unity with the "flowing" part of Mankind, the need for "space," for elbow room in order to find one's real self. "The sun is setting. I feel this river flowing through me—its past, its ancient soil, the changing climate. The hills gently girdle it about; its course is fixed" (318).

Thus Miller leaves the reader with a consciousness of "self". The struggle is not yet over for Miller or the reader, because there is as yet no statement of purpose, only a beginning of self-understanding. Miller himself described *Tropic of Cancer* as "a blood-soaked testament revealing the ravages of my struggle in the womb of death." *The World of Sex* (1959) 17-18. Yet the book essentially is a synthesis by Miller of a persistent American literary tradition and experience with contemporary European philosophy to create a new and optimistic image of twentieth century man. It is an image which Miller strove to obtain by self-liberation, by commitment to a personal identity—regardless of society's particular conventions, definitions and demands.

6. In the recently issued, *The Great Ideas Today*, 1962, a continuation of *Great Books of the Western World*, coedited by Robert M. Hutchins and Mortimer J. Adler and published by Encyclopedia Britannica, Inc., one of America's most respected literary critics, Alfred Kazin, in the section of the book on literature (115-161), devotes a portion of his discussion to Henry Miller's *Tropic of Cancer* (146-148). Mr. Kazin states that the real significance of Miller's novel lies in "its frank dismissal of the given world, the supposed moral order of the world. For Miller the world is essentially an hallucination, and the hungry, desperate man who roams the streets of Paris in *Tropic of Cancer* is concerned to reinstate the proper version of things, by a surrealistic displacement of what we think is real. So much emphasis is placed on the self, the author as the hero of his own narrative, because a powerful new act of consciousness is required of him. . . . This is the basis on which Miller sings a new 'song of myself' in the Whitman tradition . . . *Tropic of Cancer* is a maddening but rewarding book. Although the narrative is confusing in its destination, you can pick up the book at any point and read it with pleasure. As Whitman does on a higher plane, Miller makes the world seem freshser, gayer, crazier, less responsible . . . He really sees life with the desperate humor of the man totally down on his luck, who at the same time has kept the wild hope of the American romantic that the world can yet be transformed."[15]

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[15]Recognition of the social importance of Miller's writings, including *Tropic of Cancer*, has grown since the 1930's. There has been a growing perception that Miller's writing has an organic unity, that his work demonstrates a sense of devotion and dedication to self in the service of humanity, to a set of artistic and

Robert Kirsch, the Literary Editor of the Los Angeles Times, asserted at the trial that *Tropic of Cancer* has social importance because "it is a work which comes in the tradition of the autobiography and the confession . . . Miller through this work initiated and inaugurated an approach to fictional autobiography . . . it had tremendous effect on American writers and on English writers" [C. T. 1375-1376]. The book has social value "as a document, reporting life in a certain time and in a certain place . . . it tells us what the vision was of one man in one place at a certain time" [C. T. 1376]. ". . . the statement which Miller makes throughout this book explicitly and implicitly of his criticism of the mores and morals and ideals of the society from which he came" has important redeeming social value [C. T. 1377].

Professor Charles Kaplan, Chairman of the Division of Language and Literature at San Fernando State Col-

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personal ideals arising from a particular constellation of talents and compulsions. West, *Mind on the Wing* (1947) 120; Glicksburg, *Henry Miller: Individualism in Extremis*, 33 Southwest Review 290 (1948); Orwell, *Inside the Whale*, a collection of essays (1940), 177-178; Maine, *Henry Miller: Bigotry's Whipping Boy*, 7 Arizona Quarterly 207 (1951); Durrell, *Studies in Genius*, 20 Horizon 46, 56 (1949). Almost all critics have defended Miller's use of explicit language as essential to his writing as honest, artistically necessary, realistic and valuable. Fowlie, *Shadow of Doom: An Essay on Henry Miller*, Accent (Autumn 1944); Krim, *The Netherworld of Henry Miller*, The Commonweal (October 24, 1952); Muller, *The World of Henry Miller*, 2 Kenyon Review (1940); Huxley, *Death and the Baroque*, Harper's (April 1949). The serious purpose and intent of *Tropic* appears in a letter written by Henry Miller to counsel for petitioner in answer to an inquiry by counsel as to how Miller views the controversy about *Tropic* more than two decades after its publication. Attached hereto as Appendix J is a copy of the letter.

lege stated below: "I think it has social importance in the same sense that the general doctrine of individuality has importance for the American citizen. It reminds him occasionally that he does not have to be a victim of the machine of a mass society, that he is an individual, that he is entitled to his individual thoughts, his individual beliefs, his individual opinions. This is an extremely affirmative book, it seems to me, enabling the individual to say what he feels has to be said. This does not mean that we have to agree with him but, at least, it affirms the right of the individual to be heard in his own terms [C. T. 1467].

Finally, Dr. Abraham Kaplan, noted professor of philosophy at the University of California at Los Angeles, stated that *Tropic of Cancer* has social importance because of Miller's "unwavering honesty . . . [the book] reflects the anguish that many people have felt and that all of us have felt to some degree or other, as to what meaning we can find in our existence . . . Make[s] us realize what a really tough problem we all have . . . trying to find a foundation for our lives, trying to find some meaning in it, some value, some kind of purpose . . . enormously important for the society to be able to face these views, to see them expressed so as to be able to understand them. And if we repudiate them, to be able to arrive at a rational foundation for repudiating them . . . So I am not now taking a position on each of a dozen different topics that Henry Miller touches on; . . . the primary question in my mind is not whether I find that attitude an objectionable one but whether it is socially important in our society to be able to face even an objectionable point of view" [C. T. 2694-2698].

7. It is submitted, in the light of the aforesaid, that *Tropic of Cancer* is a genuine work of literature which expresses ideas, and has an important position in the history and development of literature. It is the work of a talented and serious artist expressing his view of life. It is also the work of a man who in the 1930's almost broke himself in body and spirit to escape a life which to him seemed a humiliating compromise. The author's "blood-soaked testament" is a searing reminder of the dangers implicit in a society which submerges individuals and deprives them of their essential dignity.

This Court has held that a writing is entitled to the full protection of the First Amendment and cannot be suppressed as obscene unless it is "utterly without redeeming social importance." *Alberts v. California*, 354 U. S. 476, 484. It has been held that the essential characteristic of liberties of speech and press is "that under their shield many types of life, character, opinion and belief can develop u nolested and unobstructed." *Cantwell v. Connecticut*, 310 U. S. 296, 310. Plainly "a community may not suppress . . . the dissemination of views because they are unpopular, annoying or distasteful." *Murdock v. Pennsylvania*, 319 U. S. 105, 116. "The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. Struthers*, 319 U. S. 141, 143.

The importance to an open society of freedom of expression has been increasingly stressed. "Free discussion of the problems of society is a cardinal principle of

Americanism" (*Pennekamp v. Florida*, 328 U. S. 331, 346); the right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that set us apart from totalitarian regimes." *Terminiello v. City of Chicago*, 337 U. S. 1, 4.

Literature and the arts are protected by the First Amendment because they have great social importance. Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 368-373 (1954). The function of literature is to interpret, criticize, innovate, mirror, intensify, clarify and experiment. Lerner and Mimms, *Literature*, IX Cyc of Soc. Sci. (1931); 5 Social Meaning of Legal Concepts (1953), 34, 36.[16] "Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created." Meiklejohn, *The First Amendment is an Absolute* in The Supreme Court Review (1961), 245, 257, 262-263.

It is respectfully submitted that freedom of expression in art and literature under the First Amendment assumes that each adult in a democratic society must be permitted to find "his own proper diet."[17] Literature contains ideas which challenge and stimulate people to think, and each person must be free to read any portrayal of the human scene which he may think deserves scrutiny. "From the multitude of competing offerings the

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[16]See also, Trilling, *The Meaning of a Literary Idea* in Aesthetics Today, edited by Philipson (1961) 213; Wilson, *Axel's Castle* (1931) 2.

[17]Barzun, *The Arts, The Snobs, and the Democrat* in Aesthetics Today, edited by Philipson (1961) 19.

public will pick and choose." *Hannegan v. Esquire*, 327 U. S. 146, 158. The societal interest in freedom of expression is that men will be free to develop their faculties; that men will be free from "irrational fears"[18] whenever conventions are questioned. *Tropic of Cancer* must be entitled to the protection of the First Amendment if the "free dissemination of ideas" is not to be the loser. *Smith v. California*, 361 U. S. 147, 151.

8. The trial court held, over objection, that the California obscenity statute should be construed as removing the protection of the First Amendment from any writing which the *average person in Los Angeles* deems "utterly without redeeming social importance." The trial court stated that the determination of whether or not *Tropic* has *social importance* "would have to be based upon the common conscience of the community, that is the average person in the community" [C. T. 516]. The jury was instructed to this effect [C. T. 2822-2823]. Throughout the trial, the "experts" were restricted to testifying whether or not in their opinion *Tropic* had any social importance to the "average person" in the local community.[19]

The court below upheld the rulings and instructions of the trial court (Appendix A). The court below held that the jury had "impliedly found" that the book was "utterly without redeeming social importance," a finding allegedly supported by the evidence, and like

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[18]Mr. Justice Brandeis in *Whitney v. California*, 274 U. S. 357, 376.

[19]The record on this issue is abundantly clear. C. T. 516-518, 601-602, 946, 1023-1026, 1051-1052, 1198-1199, 1378-1379, 1500-1501, 1971-1972, 1976-1977, 2019, 2022-2032, 2034-2040, 2262-2265, 2434-2444, 2494-2497, 2536-2538, 2637-2638, 2750-2753, 2803-2808.

any other "issue of fact," not to be disturbed on appeal (Appendix A p. 2). "We believe that juries are composed of average persons" (*Id.* p. 3). The Court further stated that to disturb the verdict of the jury that the book was utterly without redeeming social importance would nullify "the People's right of trial by jury" (*Id.* p. 7), stated the court below, and require the court to substitute its own "independent judgment in favor of the free speech and press guarantee, which we do not" (*Id.* p. 6).

It is respectfully submitted that the application of the standards enunciated by the courts below would reduce art and literature to levels acceptable only to "those of the average or majority of the populace." Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 114 (1960). To permit the punishment of a bookseller on the theory that the *social importance* of a book is to be determined only by what the "average person" in the community believes, and to instruct the jury that they must determine the social importance of a writing by the "common conscience of the community" is to condemn creative, probing minds to an officially disciplined uniformity "for which history indicates a disappointing and disastrous end." *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 637. The national tradition is to the contrary.[20] This Court has

[20]Mill, *On Liberty* (Great Books ed.); Milton, *Areopagitica* (Great Books ed.) 389-391, 397-399; Madison, *Report on the Virginia Resolutions in Elliott's Debates* (1907 ed.) 569-571; Jefferson, *A Bill for Establishing Religious Freedom*, II Works of Thomas Jefferson (Fed. ed.) 438-441; Chafee, *Free Speech in the United States* (1941) 33; Commager, *Freedom Loyalty Dissent* (1954) 14-15.

stated that the basic guarantee of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority." *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684, 689. The observation of Judge Augustus Hand in *United States v. One Book Entitled Ulysses*, 72 F. 2d 705, 708 (2 Cir. 1934) should be recalled: "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."[21]

9. A constitutional infirmity was also engendered by the action of the courts below in restricting proof at the trial as aforesaid to the limits of candor in the Los Angeles community.[22] Clearly the standards for judging

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[21]The trial court refused to instruct that the words "redeeming social importance" include, among other things, the literary or artistic value or merit of the book; include the theological, sociological, educational, or other social values of the writing; that offensiveness to the sensibilities of an individual, or even a substantial segment of the community was not sufficient to condemn the book; that the free speech provisions of the First Amendment permit wide varieties of taste and reject official norms; that the guarantees of the Constitution are not confined to the expression of ideas that are conventional or shared by a majority, and other instructions of a like character. C. T. 62, 64, 65, 74, 90-102, 103. See also, Perelman, *If It Please Your Honor*, The New Yorker, April 28, 1962, pp. 37-38.

[22]C. T. 513-518, 601-602, 665-668, 673-675, 994-996, 1500-1501, 1730-1737, 1990-1991, 2262-2267, 2294-2299, 2494-2497, 2717-2719, 2742-2745. California has 58 counties, of which Los Angeles is only one. There are approximately 400 urban unincorporated and incorporated communities with populations of 2,500 or more in the State. Los Angeles County has only 73 incorporated cities and 85 unincorporated towns. World Almanac (1962) 259-261; California Roster (1961) 253-258. Petitioner

obscenity were intended to achieve a general and predictable national policy on obscenity, free of local or temporary distortions. As to the degree of public acceptance of a writing, a country-wide approach would appear to be unavoidable. See, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 108-114 (1960); A.L.I. *Model Penal Code*, §207.10(2) (Tent. Draft No. 6, 1957) 44-45.

Such a construction of the law by the courts below leads to the "balkanization" of freedom of expression in the country, permitting hundreds and thousands of local subdivisions to engraft their different standards upon the nation's literature and art and all media of communication; such a "crazy quilt" construction deprives an obscenity statute of any meaningful criteria of guilt; the inevitable tendency of such vague and ambiguous law is to diminish the circulation of the press and to reduce the reading of books of general circulation dealing with sex to the level of reading of the most censorious local community; it results in the citizens of one part of the country enjoying the right to read literature denied capriciously to citizens of another part of the country and it subverts the functions of appellate courts, required to measure the extent of freedoms of speech and press under First Amendment standards, by intruding conflicting standards imposed by a local community. *Smith v. California*, 361 U. S. 147, 152-154; *Marcus v. Search Warrants of Property, etc.*, 367 U. S.

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requested the trial court to charge the jury "that in applying contemporary community standards to the book, you are not restricted to the City of Los Angeles nor even to the Los Angeles Metropolitian area." The instruction was refused. C. T. 61.

717, 730-731; *Butler v. Michigan*, 352 U. S. 380, 383; Lockhart and McClure, *Censorship of Obscenity*, 45 Minn. L. Rev. 5, 112 (1960).

10. Measured by constitutional standards, there is a complete absence of evidence in the record to establish that *Tropic of Cancer* appeals to the prurient interest or goes substantially beyond limits of candor in the description of sex in literature.[23] The predominant appeal of *Tropic* is to a literary and intellectual interest. As the book and its commentators make clear, the "objectionable" words and scenes in *Tropic* are part of the working out of a valid literary endeavor; they are relevant to the dominant theme and necessary to communicate that theme. See, Lockhart and McClure, *Censorship of Obscenity*, 45 Minn. L. Rev. at 91-92 (1960). See also, *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, 437-439 (2 Cir. 1960) affirming 175 F. Supp. 488, 501-502 (S. D. N. Y. 1959).

Tropic of Cancer, published by Grove Press, Inc. in 1961 was distributed with decorous advertising devoted solely to its literary merit.

It is respectfully submitted that *Tropic of Cancer* cannot be held obscene in the constitutional sense. *Alberts v. California*, 354 U. S. 476; *Times Film Corp. v. City of Chicago*, 355 U. S. 35; *Sunshine Book Co. v. Sum-*

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[23]The uncontradicted testimony shows that petitioner honestly believed that the book had ideas of social importance, that the writing was not utterly without redeeming social importance, and was therefore not obscene under the law. C. T. 230-231, 392, 397, 402, 1081-1083, 1751-1768, 1775-1781, 1790-1812, 1814-1818, 1819-1907, 1907-1923, 1923-1927. The trial court declined to give proposed instructions by petitioner on this issue. C. T. 63, 77, 78. Compare, *Smith v. California*, 361 U. S. 147.

merfield, 355 U. S. 372; *One, Inc. v. Olesen*, 355 U. S. 371; *Mounce v. United States*, 355 U. S. 180; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478. See also, *United States v. One Book Entitled Ulysses*, 72 F. 2d 705 (2 Cir. 1934), affirming 5 F. Supp. 182 (D. C. N. Y. 1933); *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960), affirming 175 F. Supp. 488 (D. C. N. Y. 1959); *United States v. Keller*, 259 F. 2d 54 (3 Cir. 1958).

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment of the court below reversed.

STANLEY FLEISHMAN,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113, Trial Court No. 151588.

Appeal by defendant from judgment and order granting probation, of the Municipal Court of the Los Angeles Judicial District, Kenneth L. Holaday, Judge. Appeal from judgment dismissed; order granting probation affirmed.

For Appellant — Brock and Fleishman by Stanley Fleishman.

Amicus Curiae in Support of Appellant — A. L. Wirin, Fred Okrand and Nathan L. Schoichet.

For Respondent — Roger Arnebergh, City Attorney, Philip E. Grey, Assistant City Attorney, Edward P. George, Deputy City Attorney.

Appellant was found guilty by a jury in the Municipal Court of the Los Angeles Judicial District of violation of P. C. § 311.2, by reason of his exhibiting and distributing of obscene matter, the book, "Tropic of Cancer," and probation was granted by that court.

Appellant argues here that the book "cannot constitutionally be held obscene" under the code "in the light of the guarantees" of the United States and California Constitutions, and that the jury verdict never answers the question of constitutionality, or whether the book was "utterly without redeeming social importance" with-

in the definition of P. C. § 311 (a). Of course, the jury makes no specific finding of constitutionality, but th trial court had instructed the jury in the language of the code and the meaning of obscenity as determined by the California and United States Supreme Courts, in which we find no error. It is presumed, in the absence of any showing to the contrary, that the jury followed the law as to which it was instructed. Thus the jury impliedly found that the book was "utterly without redeeming social importance", a finding amply supported by respondent's expert witnesses. With this finding we must agree, since, as we stated in *People v. Harris* (1961), 192 Cal. App. 2d Supp. 887, 894; "We hold that, if the contents of the book could not support an implied finding that it is obscene, the question is for the court, but if it could support such a finding, the question is for the jury as in any other case where there is an issue of fact." In *Roth v. United States* (1957) 354 U. S. 476, 490, 1 L. ed. 2d 1498, 1510, as we pointed out in *People v. Harris, supra*, p. 894, the Supreme Court approved an instruction informing the jurors that they were "the exclusive judges of what the common conscience of the community is. . . ."

The recent case, *People v. Williamson* (1962), 207 A. C. A. 885, 888, held that '. . . whether a particular book is obscene is primarily one of fact," relying on *Roth-Alberts* which approved the definition of obscenity stated in *People v. Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 961. The Supreme Court of California in *In re Harris* (1961), 56 Cal. 2d 879, 880, stated: "The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether *to the average person* [emphasis ours], apply-

ing contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest. [Citations.]" *People v. Williamson, supra*, quotes that standard verbatim, then upholds the giving of an instruction employing the almost exact wording of the definition of obscenity contained in P. C. § 311 (a). We believe that juries are composed of average persons.

Appellant argues that the Legislature made as an integral part of the definition of obscenity, that the matter be utterly without redeeming social importance (appellant at p. 12 opening brief uses the word "value," which is not the same as the word "importance" employed by the Legislature), and thus has made it the obligation of every judge and appellate court before whom the constitutional issue is raised, to make an independent review of the matter to determine whether the matter can be found "constitutionally" to be obscene. He cites numerous United States Supreme Court decisions to "the requirement of independent judgment." A review of those cited shows: *Times Film Corp. v. City of Chicago* (1957) 355 U. S. 35, 2 L. ed. 2d 72; *Sunshine Book Co. v. Summerfield* (1958) 355 U. S. 372, 2 L. ed. 2d 352; *One, Inc. v. Oleson* (1958) 355 U. S. 371, 2 L. ed 2d 352 (all per curiam opinions merely citing the *Roth* case); *Kingsley Corp. v. Regents of Univ. of N. Y.* (1959) 360 U. S. 684, 3 L. ed. 2d 1512, (concurring opinion of Justice Harlan, concurred in by Justices Frankfurter and Whittaker at 3 L. ed. 2d 1524, wherein those Justices were referring, at p. 1526, not to a trial court's finding but to three of seven New York State Justices' opinion, 151 N. E. 2d at 200, and to the scope of the applicable

New York law, and stated: "The opinion . . . ., as . . . with §§ 122 and 122-a themselves when independently read in their entirety, . . ." and at p. 1527 of 3 L. ed. 2d, Justice Harlan said: ". . . I have viewed this film"); *Manual Enterprises, Inc. v. Day* ..... U. S. ....., 8 L. ed. 2d 639, in which the justices could not agree on an opinion, concerning a ruling by the Postmaster's Department, barring certain magazines from the U.S. mails, under a Federal statute; Justices Harlan and Stewart made an independent review of the proscribed magazines (id. p. 648); it does not clearly appear that the other Justices did so. Those cases do not support the thesis that independent judicial judgment on review is *required*, although, of course, it may be practiced. The other cases cited by appellant from federal courts inferior to the Supreme Court or from the courts of other states are at most merely persuasive and not binding on our court.

Moreover, the book here in question has been read by this court, unlike the U. S. Supreme Court, except for Justice Harlan, in the *Roth* case, (1957) 354 U. S. 476, 1 L. ed. 2d 1498, 1509, 1514. From that reading, we regard the book, as a whole, as an autobiographical abortive attempt at literature by an American self-expatriate in Paris, separated from his wife who sends him money at times, from whom he is mentally, spiritually and physically divorced, indulging in adulterous relationships with Paris street women and others,

whom he frankly and appropriately terms "whores", as well as other barrack-room four-letter words; his chief obsession, interest and necessity (waking or sleeping, drunk or sober) is food, drink and sexual acts or conversation about the same; the slimy flow of his attraction to excrement expressed in a four-letter word and thoughts thereof runs like a sewer through his printed work; the putrid paragraphs and pages of pornography pervade the book. Though some pages present the author's thoughts and ideas, at times cleverly written, describing his selfincrimination as a moral derelict and social dissenter, belonging "not to men and governments"; but even these pages are often intersticed with the putrescence and slime of his mental sewer, his lewdness and lascivity with which he is constantly preoccupied. The entire book is obscene, to the average person, applying contemporary standards, and is predominantly an appeal "to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance", as defined in P. C. § 311 (a). Eighteen expert witnesses of stature thought so and so testified; the jury thought and found so, so do we. We hold, as did the jury, that the book is obscene and utterly without redeeming social importance. Although *Roth v. United States* (*Alberts v. California*), 354 U.S. 476, 1 L. ed. 2d 1498, states that "ideas having even the slightest redeeming social importance . . . have

the full protection of the guaranties . . .", we must consider the language of the court, immediately following the above: ("unless excludable because they encroach upon the limited area of more important interests." (p. 484 U. S., 1507 L. ed. 2d) We hold, not only, that the book has not the slightest tendency to show some social importance, but also that it lacks anything in the slightest *redeeming*. In our opinion the protective interest of the state in the morality of its citizens, would be encroached upon should we hold otherwise. Further, were we to substitute our independent judgment in favor of the free speech and press guarantee, which we do not, it would be to fly in the face of the California Constitution, Art. 1, section 7, reading: "The right of trial by jury shall be *secured to all*, and remain inviolate. . . ." (Emphasis ours.)

"Under the constitution of this state the same right is guaranteed to the people as to the defendant to have a jury ultimately pass upon *the fact* of guilt or innocence." (Emphasis ours.) *People v. Stoll* (1904) 143 Cal. 689, 696. "In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a *trial court* to the same extent and in the same degree as has the accused. (*People v. Stoll*, 143 Cal. 689, 696. . . .)" (Emphasis ours.) *People v. Wisecarver* (1944) 67 Cal. App. 2d 203, 209, quoted in *People v. Misner* (1955) 134 Cal. App. 2d 377, 380-1. See also 29 Cal. Jur. 2d pp. 475-482; 497-500.

We are of the opinion that where substantial evidence supports the implied findings of the jury, an appellate court, not only is not required to but should not in effect set aside the factual determination by a jury that the book was obscene and that the appellant violated our penal provisions making obscenity a misdemeanor. To do so would encroach upon and destroy the People's right of trial by jury, secured to them by our Constitution, which thereby should "remain inviolate". That right would nullify the finding by the jury that the book in fact was obscene, viewed by them as to every explicit facet of the code definition, contained in one complete sentence.

We believe that the jury's finding of obscenity should be accorded at least as great, if not more constitutional weight, than that of a writer's right to imprint or disseminate through a bookstore, his depraved and degrading filthy words and obscene utterances and lewd depictions of salacious episodes of sexual scenes and mental images or than that of a bookstore proprietor to exhibit and distribute such demoralizing obscene writings. This issue is not the right of any person to read such writings, but the right of appellant to sell, exhibit or distribute them when they have been found obscene, in violation of a constitutional state statute, by a jury whose finding is supported by very substantial evidence, under instructions informing them of the legal standard of obscenity as interpreted by the highest court of our land.

The appeal from the judgment is dismissed, there being no judgment. The order granting probation is affirmed.

Dated Oct. 24, 1962.

HULS,
Judge.

I concur:

SWAIN
Presiding Judge

I concur. The purpose of this memorandum is not to limit or qualify the main opinion but to present an additional basis for affirmance. In my opinion the judgment may be affirmed even though our own examination of the book may disclose that substantial portions of the book have much social importance. Solely to illustrate the distinction I wish to make, let us consider the example of an author who writes something which even the most hardened purveyor of pornography would concede was obscene and who publishes it within the covers of a book which also contains some well-recognized literary classic, admittedly not obscene and having great social importance. Because they are two separate unconnected writings, we are sure all would concede that the latter could not redeem the former and the "book" could be banned. I believe there is only a difference in degree between that and a situation where there is added to a legitimate literary work certain obscene passages, not for the purpose of enhancing the literary passages but for the purpose of

appealing to the nonliterary audience interested only in such smut, in order to sell books to them. Of course in determining whether the criticized portions are indeed obscene, they must be considered with and as part of the entire novel, and if so considered as a whole the matter is not obscene then there is no violation of law. But if so considered they are not a legitimate part of the literary work but are added islands of smut (to use a different but more accurate four letter word than perhaps the author might have used), then such obscenities are without anything to "redeem" them and, within the meaning of the statute and cases, are "utterly without redeeming social importance." I am not saying that all such material here is unnecessary to the development of the ideas the author is trying to convey. Some portions of it may be entirely proper. I am saying that the jury was justified in finding as a matter of fact that the author went too far, and we would not be justified in holding as a matter of law that the book is not obscene.

SMITH
Judge

APPENDIX B.

Order Certifying Cause to District Court of Appeal.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Bradley Reed Smith, Defendant and Appellant. Superior Court No. CR A 5113. Trial Court No. 151588.

This action is hereby certified on our own motion to the District Court of Appeal. The judgment and opinion of this court was filed October 24, 1962. It affirmed an order granting probation made after defendant was found guilty of exhibiting, distributing, offering to distribute and having in his possession with intent to distribute, obscene matter, to-wit, the book "Tropic of Cancer", in violation of P.C. § 311.2. This court held that the book was obscene within the meaning of P.C. § 311 (a).

The following important questions of law should be settled:

1. Is the book "Tropic of Cancer" obscene?

2. If the book has literary merit does that alone give it redeeming social importance which takes it out of the class of being obscene?

Dated October 24, 1962.

By the court.

SWAIN
Presiding Judge

HULS
Judge

SMITH
Judge

APPENDIX C.

Order Denying Transfer on Certification.

In the District Court of Appeal of the State of California, Second Appellate District, Division Three.

The People of the State of California, Plaintiff and Respondent, v. Bradley Reed Smith, Defendant and Appellant. 2nd Crim No. 8607. Superior Court No. Cr A-5113. Trial Court No. 151-588.

Filed Nov. 15, 1962.

The Court:

The record on transfer in the above-entitled case having been filed in this court on October 31, 1962, pursuant to certification by the Superior Court of the County of Los Angeles, and this court having considered the matter of whether such case should be transferred to this court for hearing and decision, it is hereby ordered that such transfer be, and it hereby is, denied.

Dated this 15th day of November, 1962.

FILES, J. would grant the transfer.

APPENDIX D.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, §311 provides:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> "(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any

picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, §311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

APPENDIX E.

Decree Dismissing Libel.

United States District Court, Eastern District of New York, United States of America. Libellant, against, Three Books, Alleged by the Customs Authorities to be Obscene, Entitled "Tropic of Cancer," "Tropic of Capricorn" and "Plexus".

Filed Aug. 15, 1961.

ORDER

On April 28, 1961, a libel of information was filed herein by libellant, United States of America, praying attachment, condemnation and forfeiture of the above-entitled article.

On April 28, 1961, a monition was duly issued out of and under the seal of this court returnable May 24, 1961 directing the United States Marshal to attach said article.

On May 24, 1961, the United States Marshal made his return on said monition that the above-entitled article had been attached, notice given and publication made; and, furthermore, on said date, proclamation was made and there were no appearances.

On May 24, 1961 Ephraim London, Esq., on behalf of one Dorothy Upham, obtained extension of time to appear and file a claim of owner and make answer to the libel herein.

Thereafter, time was further extended to Dorothy Upham to appear, file a claim of owner and answer herein up to and including the tenth day following the date on which the United States Court of Appeals for the Second Circuit rendered a decision in a com-

panion action relating to the above-entitled article and such time has not expired.

The libellant, United States of America, now seeks to dismiss its libel herein and discontinue this proceeding.

NOW THEREFORE, upon consent of the United States of America and Dorothy Upham, as evidenced below, it is

ORDERED, ADJUDGED AND DECREED that the above-entitled action is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the United States Marshal release and deliver the above-captioned article to the possession of Dorothy Upham or her legal representative.

Dated: Brooklyn, New York
August 15, 1961

JACOB MISHLER
U. S. D. J.

The foregoing order is hereby consented to:

JOSEPH P. HOEY,
United States Attorney
Eastern District of New York
Proctor for Libellant
271 Washington Street
Brooklyn 1, New York
By MALVERN HILL, JR.,
Assistant U. S. Attorney

EPHRAIM S. LONDON
Proctor for Dorothy Upham
1 East 44th Street
New York 17, New York
By JORDAN DERWIN

APPENDIX F.

New York Times—6-14-61

"Tropic of Cancer" Scores a Victory.

Special to The New York Times

WASHINGTON, June 13—The Post Office abandoned its move today to bar Henry Miller's "Tropic of Cancer" from the mails as obscene.

Officials termed this a tactical step. They explained that suits testing whether the novel was obscene by legal definition were pending, and that it would be wise to await their outcome.

However, it was learned that the Justice Department had advised the Post Office to drop the case for another reason—that it was likely to lose in the courts.

Justice Department lawyers warned that the novel, however explicit it was about sexual matters, was recognized by many critics as having literary merit. That fact, they said, would make it difficult to sustain any postal ban in the courts.

Two suits are in New York. They arose from an attempt by Mrs. Dorothy Upham, a New York artist, to import a Paris edition of the book.

APPENDIX G.

Statement in Support of the Freedom to Read and Signatures Thereto.

We, the undersigned, strongly endorse Judge Samuel B. Epstein's defense of the freedom to read in his historic decision in the *Tropic of Cancer* case in Chicago. Judge Epstein, by stating that the "right to free utterance becomes a useless privilege when the freedom to read is restricted or denied," has put the issue of police censorship squarely before the public. In recent months, policemen, encouraged by certain minority pressure groups, have succeeded in forcing their own narrow-minded literary tastes upon many communities.

We believe with Judge Epstein that neither the police nor the courts should be allowed to dictate the reading matter of a free people. The issue is not whether *Tropic of Cancer* is a masterpiece of American literature; rather, it is whether an author of Henry Miller's artistic integrity is entitled to the protections afforded by the Constitution of the United States.

This is an issue of immediate and serious concern to every citizen who holds dear the traditions of our democracy, and who abhors the intrusion of official censorship into the vital area of artistic and literary expression. It is an issue to which we are especially sensitive.

Judge Epstein's ruling against book banning has reaffirmed the right of a free people to decide for itself what it may or may not read. Beyond that, it sounds a clear warning to all of us to guard the principles upon which our country was built.

We urge all who, along with Judge Epstein, rese police censorship in the area of literature and the ar to make their voices heard in their own commun ties and to defeat any attempts at repression befo they are allowed to erode our most precious freedom

Herbert M. Alexander
Pocket Books, Inc.

Gay Wilson Allen

Aaron Asher
Meridian Books, Inc.

Harry Ashmore
Encyclopedia Britannica

Herbert S. Bailey, Jr.
Princeton University Press

F. Sherman Baker
St. Martin's Press, Inc.

James Baldwin
Betty Ballantine
Ballantine Books, Inc.

Ian Ballantine
Ballantine Books, Inc.

William Barrett

Sheila Barry
Taplinger Publishing Co., Inc.

Jacques Barzun
Howard K. Bauernfeind
J. B. Lippincott Co.

Saul Bellow
Eric Bentley
Paul Bixler
Antioch Review

Louise Bogan
Charles G. Bolte
The Viking Press, Inc.

Edward E. Booher
McGraw-Hill Book Co.

Keith Botsford
The Noble Savage

Walter I. Bradbury
Harper & Brothers

Ned Bradford
Little, Brown & Co.

George Braziller
George Braziller, Inc.

Germaine Bree
Harvey Breit
John Malcolm Brinnin
George P. Brockway
W. W. Norton & Co., Inc.

Donald W. Brown
Penguin Books, Inc.

Eugene Burdick
Charles R. Byrne
Macfadden-Bartell Corp.

Herb Caen
San Francisco Chronicle

Erskine Caldwell
Angus Cameron
Alfred A. Knopf, Inc.

Truman Capote
Mark Carroll
Harvard University Press

John Ciardi
Ross Clairborne
Dell Publishing Co., Inc.

Harold Clurman
Arthur A. Cohen
Holt, Rinehart & Winston, Inc.

Evan S. Connell
Contact

John Cournos
Pascal Covici
The Viking Press, Inc.

Thomas A. Dardis
Berkley Publishing Corp.

Edward Darling
Beacon Press

Peter H. Davison
Atlantic Montly Press

Edward DeGrazia
Edward C. Delafield, Jr.
Crown Publishers

Patrick Dennis
John Dos Passos
Grant Dugdale
The World Publishing Co.

James W. Ellison
Holt, Rinehart & Winston, Inc.

Richard Ellmann
Jason Epstein
Random House

John Ervin, Jr.
University of Minnesota Press

Clifton Fadiman
John Farrar
Farrar, Straus & Cudahy, Inc.

Lawrence Ferlinghetti
City Lights Books

Philip S. Foner
Citadel Press

Jerome Fried
The World Publishing Co.

John G. Fuller
Saturday Review

Bernard Geis
Bernard Geis Associates

Maxwell Geismar
Jack Geller
Emanuel Geltman
Horizon Press, Inc.

Arnold Gingrich
Esquire

K. S. Giniger
Hawthorne Books, Inc.

Herbert Gold
Harry Golden
John L. Goldwater
Belmont Books

Mitchell Goodman
Horizon Press, Inc.

Robert Gottlieb
Simon & Schuster, Inc.

Louis C. Greene
R. R. Bowker Co.

Howard Greenfeld
The Orion Press, Inc.

Horace Gregory
John Howard Griffin
Richard L. Grossman
Simon & Schuster, Inc.

William B. Harvey
New York University Press

A. L. Hart, Jr.
The Macmillan Co.

Hiram Haydn
Atheneum Publishers

Hugh M. Hefner
Playboy

Charles A. S. Heinle
Chilton Co., Book Division

Joseph Heller
Lillian Hellman
Cecil Hemley
The Noonday Press

John Hersey
Henry B. Hibbard
Barnes & Noble, Inc.

Granville Hicks
Lawrence Hill
Hill & Wang, Inc.

William Hogan
San Francisco Chronicle

Tay Hohoff
J. B. Lippincott Co.

John Clellon Holmes
Sidney Hook
Irving Howe
Dissent

B. W. Huebsch
The Viking Press, Inc.

Richard Huett
Dell Publishing Co., Inc.

J. Lawrence Hughes
William Morrow & Co., Inc.

Aldous Huxley
Harold E. Ingle
The Johns Hopkins Press

Sidney R. Jacobs
Alfred A. Knopf, Inc.

James M. Jacobson
Pocket Books, Inc.

James Jones
Fred Jordan
Grove Press, Inc.

Mackinlay Kantor
Jeremiah Kaplan
The Crowell-Collier Publishing Co.

Alfred Kazin
Jack Kerouac
Chester Kerr
Yale University Press

Robert Kirsch
Los Angeles Times

Donald S. Klopfer
Random House

Conrad Knickerbocker
Kansas City Star

Kenneth Koch
Herman Kogan
Chicago Sun-Times

Louis Kronenberger
Eric Larrabee
American Heritage

James Laughlin
New Directions

John T. Lawrence
William Morrow & Co., Inc.

Seymour Lawrence
Atlantic Monthly Press

Max Lerner
Freeman Lewis
Pocket Books, Inc.

R. W. B. Lewis
Denver Lindley
The Viking Press, Inc.

Robert Lowell
Storer B. Lunt
W. W. Norton & Co., Inc.

Kenneth McCormick
Doubleday & Co., Inc.

Carson McCullers
Robert M. MacGregor
New Directions

Carey McWilliams
The Nation

Robie Macauley
Kenyon Review

Ian Mackenzie
St. Martin's Press, Inc.

Norman Mailer
Bernard Malamud
Marya Mannes
Daniel Melcher
R. R. Bowker Co.

Frederic G. Melcher
R. R. Bowker Co.

Thorpe Menn
Kansas City Star

Daniel Mich
Look

Arthur Miller
M. Hughes Miller
The Bobbs-Merrill Co., Inc.

Gilbert Millstein
New York Times

Eric Moon
Library Journal

Marianne Moore
Frederick Morgan
Hudson Review

Alice Morris
Harper's Bazaar

Truman Nelson
Hoke Norris
Chicago Sun-Times

Theodore O'Leary
Kansas City Star

Hyung Woong Pak
Chicago Review

Norman Holmes Pearson
Arthur Pell
Liveright Publishing Corp.

Bernard B. Perry
Indiana University Press

Robert Phelps
George Braziller, Inc.

William Phillips
Partisan Review

Samuel H. Post
Belmont Books

Lawrence Clarke Powell
Ben Raeburn
Horizon Press, Inc.

Henry Rago
Poetry

Kennett L. Rawson
David McKay Co., Inc.

Theodor Reik
Elmer Rice
Anders Richter
University of Chicago Press

Harold Robbins
Henry Robbins
Alfred A. Knopf, Inc.

Paul H. Rohmann
Antioch Review

Barney Rosset
Grove Press, Inc.

Philip Roth
William H. Ryan
Angel Island Publications

Howard W. Sams
The Bobbs-Merrill Co., Inc.

Mark Schorer
Webster Schott
Kansas City Star

M. Lincoln Schuster
Simon & Schuster, Inc.

Lew Schwartz
Abelard-Schuman, Ltd.

Peter Schwell
Simon & Schuster, Inc.

William R. Scott
William R. Scott, Inc.

Edwin Seaver
George Braziller, Inc.

Richard Seaver
Grove Press, Inc.

Leon E. Seltzer
Stanford University Press

Rod Serling
Karl Shapiro
Leonard Shatzkin
The Crowell-Collier Publishing Co.

Irwin Shaw
William L. Shirer
James H. Silberman
The Dial Press, Inc.

Henry W. Simon
Simon & Schuster, Inc.

Morris Sorkin
Citadel Press

George Stevens
J. B. Lippincott Co.

Irving Stone
Harold Strauss
Alfred A. Knopf, Inc.

Lyle Stuart
Lyle Stuart

William Styron
Aaron Sussman
Sussman & Sugar, Inc.

Alan Swallow
Alan Swallow, Publisher

Richard Taplinger
Taplinger Publishing Co., Inc.

Frank Taylor
The Racine Press

Evan W. Thomas
Harper & Brothers

Lionel Trilling
Mark Van Doren
Dan Wakefield
Arthur W. Wang
Hill & Wang

Robert Penn Warren
Edwin Watkins
University of Michigan Press

Howard Sayre Weaver
Yale University Press

Richard Wilbur
John C. Willey
William Morrow & Co., Inc.

Edmund Wilson
Thomas J. Wilson
Harvard University Press

Donald Wollheim
Ace Books, Inc.

W. A. Wood
University of Chicago Press

Philip Wylie
Thomas Yoseloff
Thomas Yoseloff, Inc.

Marya Zaturenska

APPENDIX H.

Bibliography of Books Written by Henry Miller.

Tropic of Cancer, Obelisk Press, Paris, 1934;

Aller Retour New York (Siana Series No. 1); Obelisk Press, Paris, 1935;

Black Spring; Obelisk Press, Paris, 1936;

Max and the White Phagocytes; Obelisk Press, Paris, 1938;

Tropic of Capricorn; Obelisk Press, Paris, 1939;

Hamlet (with Michael Fraenkel), Vol. 1 (complete); Carrefour, Paris-New York, 1943, Vol. 2; Carrefour, Paris-N.Y., 1941;

The Cosmological Eye, New Directions, N.Y., 1939;

The World of Sex; Olympia Press, Paris, 1959;

The Colossus of Maroussi; The Colt Press, San Francisco, 1941;

The Wisdom of the Heart, New Directions, N.Y., 1944;

Sunday After the War; New Directions, N.Y., 1941;

The Air Conditioned Nightmare; New Directions, N.Y., 1945;

Maurizius Forever; The Colt Press, San Francisco, 1946;

Remember to Remember, New Directions, N.Y., 1947;

The Smile at the Foot of the Ladder; Duell, Sloan & Pearce, N.Y., 1948;

Sexus, 2 vols. (Book One of The Rosy Crucifixion); Obelisk Press, Paris, 1949;

The Books in My Life, New Directions, N.Y., 1952;

Plexus, 2 vols. (Book Two of the Rosy Crucifixion), The Olympia Press, Paris, 1953;

The Time of the Assassins; New Directions, N.Y., 1956;

Nights of Love and Laughter; New American Library of World Literature, N.Y., 1955;

Big Sur and the Oranges of Hieronymous Bosch; New Directions, N.Y., 1956;

A Devil in Paradise; Signet Pocket Book, New American Library, N.Y., 1956;

Quiet Days in Clichy; The Olympis Press, Paris, 1956;

The World of Sex (revised edition); The Olympia Press, Paris, 1957;

The Red Notebook; Jargon Books, Highlands, N.C., 1958;

Reunion in Barcelona; The Scorpion Press, Northwood, England, 1959;

The Intimate Henry Miller; Signet Pocket Books, New American Library, N.Y., 1959;

Nexus, Vol. 1; The Olympia Press, Paris, 1959;

Stand Still Like the Hummingbird; New Directions, Norfolk, Conn., 1962;

Henry Miller, watercolors, drawings, and essay, The Angel is my Watermark, Harry N. Abrams, New York, 1962.

APPENDIX I.

Review of Tropic of Cancer.

DOROTHY PARKER—"Esquire" September, 1961:

"Henry Miller's 'Tropic of Cancer', now obtainable in the United States, was written in Paris in 1934; ever since it has been banned in English-speaking countries. I am as opposed to the banning of a book, any book, as I am to capital punishment; one seems to be as brutishly stupid as the other, and as ineffectual. The suppression of 'Tropic of Cancer' I find peculiarly idiotic. The book contains, of course, all the short, ugly words that probably roused the fuss. But they are honest words, to be used with respect for their force; thrown, as they are by their hundreds, on the pages of 'Tropic of Cancer' they become cold and tedious as autumn rain; tedium is not obscenity. There are many and many blow-by-blow descriptions of the sexual act, but there are few if any variations on the old, old theme—nothing whatever to make a reader rush forth and try out novelties. Life on the Left Bank, as here depicted, is crammed with discomforts, from cold and hunger to invasion by tiny monsters; cockroaches stride across the floors and march arrogantly over the pillows of those that have pillows, and lovers exchange lice and nits; nothing whatever, is there to cause a man to throw down his job, abandon his immaculate wife and fragrant little ones, and streak for *la belle France*. 'Tropic of Cancer' may not be the one book that you would want to have with you on a desert island, but it is certainly no incitement to lechery * * *."

* * * * *

BEN RAY REDMAN—*"Saturday Review", June 24, 1961:*

* * * * *

"Seldom has a book come to us laden with such praise. Mr. Shapiro, who calls Miller 'the greatest living author', once thought it would be a fruitful idea to put 'a bible of Miller's work . . . in every hotel room in America, after removing the Gideon Bibles and placing them in the laundry chutes.' Ezra Pound, T. S. Eliot, George Orwell, and Edmund Wilson have saluted 'Cancer' as a modern classic. Horace Gregory thinks of it as 'Huck Finn in Paris'—an original and provocative conception. John Ciardi writes that 'there can be no doubt that "Tropic of Cancer" is a substantial work of art'. Harry T. Moore finds it 'a healthy book, not an unclean one'. Sir Herbert Read proclaims it to be 'one of the most significant contributions to the literature of our time.'* * *

"As for the famous four-letter words, they are taboo—when they are—only because of convention indefensible by reason. 'Ordure' and 'copulate', for example, have exactly the same meanings as their more common equivalents, and evoke the same mental images. What are being objected to, then, are mere sounds. A foolish business, one might think; but of late the areas of objection have, of course, been shrinking rapidly.

"It should be added that once a taboo word emerges into general usage it loses its potency. We now refer to a woman's 'leg', instead of her 'limb', with no feeling of verbal daring.

"Perhaps Mr. Shapiro is right in calling Miller the greatest living author, but this can be proved

or disproved only with time. Certainly he is one of the most remarkable, most truly original authors of this or any age. He is a word-master whose range, so far as I know, is unique in breadth and depth. All the ugliness and much of the beauty of the world, all the evil and much of the good, lie within his understanding and expressive grasp. Miller can be astonishing, enchanting, and revolting.

* * *

"Women, most of them prostitutes, throng 'Tropic of Cancer.' Miller and his pals lust after them daily, and perform feats of satyriasis; but in their thoughts and talk a woman is seldom a 'woman'—she is a four-letter name for a portion of her anatomy.

"Filth and fornication, however, fill only a portion of Miller's world. He can write like an angel or like a hog in a reeking pen, but never like a man who has compromised with either life or art. His descriptions of Paris—its streets, squares, houses, public buildings, brothels, cheap hotels, slums and dives, its air and sunlight, and its river that flows through the city 'like a great artery running through the human body'—are matchless. His words on art and artists, the United States, the lockstep of conformity, Matisse, Dostoevsky, Joyce, Proust, mankind's future, and a score of other topics, keep the reader's mind alert with their challenges.

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"Readers who find 'Tropic of Cancer' emetic—as Judge Wollsey found 'Ulysses'—and who thrust

it from them, will miss much; but there is no reason to sneer at them. The only censorship that can work in this field is self-censorship, and surely it is permissible. But any public censor who touches this book will touch living tissues—much of it disgusting, much of it beautiful."

ERIC MOON, Editor *"Library Journal", June 18, 1961:*

"This book will present many librarians—public librarians particularly—with a test of conscience and courage in book selection. Outside the U. S. (and Britain), Miller is generally regarded as one of the major contemporary American writers. With Joyce and Lawrence, he has been a major influence in extending the frontiers of the modern novel, and he has gone much further into enemy territory than either of the other two. 'Tropic of Cancer', perhaps slightly the cooler of Miller's two 'Tropics', has been kept from the American public with great vigilance on the part of customs officials for 27 years, ever since its first publication in Paris in 1934. Now that it has broken this barrier, it seems certain that it will become the No. 1 target for those bands of self-appointed censors who roam the country in search of four-letter words and in defense of adolescent morals. The book is one part of a never-ending fictional autobiography—Miller really never writes anything else. The Miller eye view of Parisian life in the 20's and early 30's is raw in its passions, its bitterness, its language. It is the lusty, uninhibited song of a man completely happy without illusions. It has humor, anger, art, and sex to saturation

point. But the sex is not the smirking sex of the Westchester bedroom sagas which have dominated the American novel in the last two decades. Miller writes about sex as he writes about everything, the beautiful or the degraded, as an artist and a man who enjoys *all* that goes to make up life and living. Karl Shapiro, in a good Introduction, claims that Miller is the greatest living author. This is an overstatement, perhaps intended to balance the scales a little. It is certain, however, that Miller is an important and influential author. In any library where creative literature means something, it is hard to accept that Grace Metalious might reach the shelves, and Henry Miller not. But it will happen."

HARRY T. MOORE—*"The New York Times Book Review", June 18, 1961:*

"Since 'Tropic of Cancer' first appeared in Paris as a paperback twenty-seven years ago, it has been smuggled into English-speaking countries which turn their Customs inspectors into censors. The high praise of such writers as T. S. Eliot, George Orwell, Edmund Wilson and Herbert Read made it contraband of uncommon quality. Now the book has at last become available in the author's native country.

"It was Henry Miller's first published volume, and it is as good as anything he has turned out since. It glows with the joy of discovery: I can write! Its engaging first-person narrative, the monologue of a man who draws people to him, tells the story of an American expatriate—not a Henry James gentleman in a Place Vendome Ho-

tel, but rather a Left Bank vagabond merrily sponging on his friends. Like him, they are members of the international, semi-literary, Parisian-tenement set, and they enjoy having him around.

"All of them, particularly the narrator, have frequent erotic adventures with every type of woman from the local *poulès* to rich American widows. Every bit of this is set down graphically, with precise physical details and Old English locutions employed both descriptively and conversationally. Yet, with cinematic abruptness, the narrative often switches from amatory scenes to lyric evocations of the *faubourg* soft in the dusk or the river streaked with lights. The style throughout is plain, though always energetic and vivid, with split-angled Braquelike images rising from the hard texture of American speech.

"* * *

* * * * *

TERRY SOUTHERN—*"The Nation", November 18, 1961:*

"Miller's work is in the tradition of Whitman, Wolfe and Sandburg, the only tradition which has so far proved indigenous to the culture; it is, of course, the tradition of *romantic agony*. Romantic agony, in the classic Baudelairean form from which it derives, may be likened to the manic-depressive syndrome in psychology; it is characterized, in its effect, by spontaneity and it contains both the lustiest affirmation of life and the most severe denial of it. In its American species it has never, before Miller, been full-blooded—the negative has always been edited out of it, either after or before leaving the author's desk; * * *

"No one who has read Henry Miller's early work, or who pretends to any information about the history of creative forms, can doubt his absolute formative influence on this aspect of the contemporary scheme. For unpredictable spontaneity and emotional range, for pure uncompromisingly schizoid integrity in self-revelation, this work—as represented by *Tropic of Cancer*, and much of it written as long as twenty-five years ago—remains without peer.

"* * *

"The over-all accomplishment of Miller's work is immeasurable. The fact that language itself has presented a problem peculiar to American literature is a fairly well-known phenomenon, though it does not always appear to be fully understood. The peculiarity of this problem is to be found in the singular circumstance that English is the only Western language which contains words of high-frequency usage—i.e., the so-called 'four-letter words'—which are, of themselves, inadmissible in certain forms of converse and in all literary forms of mass media. * * *

"One of the crucial problems, then, in American literary creation has been how to avoid the use of these words with the minimum loss of verisimilitude in dialogue, and without too seriously crippling the chance, in narrative, for meaningful self-expression. Artists have deplored these arbitrarily imposed limits as nothing less than primitive superstition, and giants, of course, have ignored them. Certainly there is no doubt as to where the bulk of credit must go for the progress so

far in overthrowing this tyranny of words. And this alone assures Miller a very high place indeed in our literary history, but it is not all. * * *

"America has produced a fair amount of literature to receive international acclaim; certainly there is no dearth of American Nobel Prize-winners. What is *rare*, however, and quite possibly unique, is for a culture to have at its bosom an artist whose major work has not merely gone unpublished in his own country, but has actually been outlawed there . . . work, that is to say, hailed throughout the rest of the world as one of the very first importance, and by an author more widely read, according to the University of California librarian, Lawrence Powell, than any American living, other than Upton Sinclair; or any dead other than Mark Twain and Jack London. Yet it is just within the past year that the public has been allowed to taste of its past and future heritage. With *Tropic of Cancer* accounted for, this leaves only *Tropic of Capricorn, The World of Sex, Black Spring, Quiet Days in Clichy, Sexus, Plexus* and at least one other volume of *The Rosy Crucifixion*—or a total of several thousand pages —still on the dark side of the horizon."

* * * * *

APPENDIX J.

Letter of Henry Miller.

Big Sur, California
Dec. 26th, 1962

Stanley Fleishman, Esq.,
1680 Vine Street—Suite 700,
Hollywood (28) California.

Dear Stanley:

At your suggestion I am setting down some of my views concerning the *Tropic of Cancer* case, which I understand is on its way to the highest court of the land.

Tropic of Cancer was begun in Paris, not Brooklyn, when I was in my fortieth year. I had already been married twice and was the father of a child. I had begun writing almost ten years before, with no success whatsoever. I left New York, my birthplace, in the early part of 1930, determined to begin life anew. In 1928, due to a freak of fortune, my wife and I traveled about in Europe several months. The impressions received during this trip abroad convinced me that if I were to continue my career as writer Europe was a better place for me to do it than America. Somehow I did not fit into the American scheme of things. From the time I graduated from High School until I decided to become a writer I must have had a hundred different jobs. I quit the last one—employment manager of the messenger department of the Western Union Telegraph Co.—resolved never to look for a job again but to live or die as a writer. That was in September 1924. *Tropic of Cancer* was published in Paris in September 1934. During this ten year period I had

written three books and any number of short stories and articles. To the best of my knowledge only two or three of the latter—none of the books—were ever published. You can imagine that it was in something like a state of desperation that I resolved to try my luck abroad.

I had imagined on leaving America that I was going to Spain, but I never got farther than Paris. I arrived there in the Spring of 1930, knowing nothing of the French language. While writing the *Tropic of Cancer* I was obliged to live by my wits, as the book sets forth. The difficulties I had experienced in pursuing the career of writer prior to leaving America were considerably augmented, to put it mildly, on arriving in France. Looking back on it all I must confess, however, that it was more enriching and instructive starving in Paris than in my home town. Thanks to the aid and encouragement of the friends I made—largely expatriates like myself—I managed to survive and finish the book. It was something of a miracle that I found there in Paris the one publisher in all the world courageous enough to sponsor such a book: Jack Kahane of the Obelisk Press. Between the time he accepted the book and its publication I rewrote the book three times.

I have often referred to this work as an ice-breaker. In writing it I found my own voice, liberation, in short. This was due, undoubtedly, to the life I led, by which I mean not only the struggles and hardships of keeping alive in a foreign land but also as a result of a growing acquaintance with French literature, the French way of life, and the acceptance accorded me by French writers. Unwittingly I found myself living

that "bohemian" life which so many celebrated writers and artists before me had been obliged to live for one reason or another. My book might be regarded, I suppose, as a celebration of that splendidly miserable kind of life. In writing it, I ought to add, I had almost no hope of its ever being accepted by a publisher. It was something I had to do in order to preserve my own integrity. It was a case of do or die. Certainly the last thing I ever dreamed of was that it would one day be published in my own country.

Perhaps it is not a "pleasant" book. It has proved, however, to be an "instructive" one—for those who know how to read it. Of that I have had much interesting testimony during the years following its publication. In the files of the library at U.C.L.A. are thousands of letters from readers of the book all over the world. The burden of most of these testimonials is that the book had a liberating effect, that it inspired hope and courage, the courage to live one's own life, come what may. It had this effect, I presume, because it is a naked, vivid account of one man's struggles with almost insuperable odds, because it is a revelatory account of this man's life, sparing nothing. Many of these readers confessed that it was the first time in all their reading experience that the whole man had been portrayed. They saluted the author as one who had restored a new kind of integrity to literature, to *our* literature, at least.

The truth of these assertions I myself discovered later when I began to investigate the emasculative process which Anglo-Saxon literature has undergone these last few hundred years. With the tremendous upheavals which the second world war brought about it became

more than ever obvious to me, and others, that our literature was not rendering a true picture of the known behavior, sexual behavior particularly, of the citizens of the Western world. Some measure of freedom had been gained perhaps, though this is not always clear, but certainly not freedom of expression in literature.

Perhaps my book would have died a normal death had it not been discovered and touted by the American and British troops stationed abroad during and after the war. I am thinking here not only of the forces in Europe, but in Asia and Africa also. (In China alone, I have been told, over 100,000 copies—pirated editions— were sold.) With the end of the war the book went into a number of translations, including French, German, Czech, Swedish, Danish, Spanish, Portuguese, Japanese, Dutch, Finnish, Hebrew, Italian. In the countries where the book has been permitted to be sold and distributed openly it has been read and accepted by the public at large, not simply by cliques and cultists, as was the case in America during the years it was banned here. I have never heard, incidentally, that the reading of the book brought about a general demoralization or an increase in crimes of a sexual nature. In all these countries, moreover, the foremost critics of the land usually hailed the work as an important contribution to literature. In my own country, because of this book and others of like nature which followed, I was elected to membership in the National Academy of Arts & Letters. This before the ban on these books had been abolished.

Certainly this book has provoked attention and discussion wherever it has been published. In every country there are those who believe that the author went

too far, that certain things may be said but not written and so on. The intensity of these discussions varies with the habits and traditions of the citizens of the various countries. Back in 1953, when I was asked to appear before the Juge d'Instruction in Paris in connection with the book *Sexus,* the judge finally asked me if I believed in complete freedom of expression. And I answered Yes. I cannot imagine a writer sitting down and saying to himself: "I think I will permit myself to say this but not that." I know, of course, that there are plenty of writers who endeavor to cater to the public's taste and who, in so doing, have an eye on the market. These men I do not regard as writers. A serious, dedicated writer is in my opinion, a man who stands behind every word he puts down and who does not impose restrictions on himself for fear of incurring public disfavor. He writes because he has the urge, because he can do no other. True, in every period there are only a few such individuals, but it is my belief that it is only these few who contribute anything of value to literature, who nourish the love of letters.

In my youth my idols, among American authors, were such as Thoreau, Emerson, Walt Whitman; they still are, I should add. I regard them as revolutionary spirits, men who were against the trend of the times. Perhaps I was drawn to such writers because I am myself a born rebel. To-day, my birthday, I am seventy one years old—and still a rebel. A rebel who has learned, as St. Francis of Assisi put it, "not to try to change the world, but to change worlds."

To come back to the free spirits . . . If they had been obliged to write down to the level of the "normal

community standard", as the phrase runs, would we have to-day the works which made them famous? Why should any thinker, in any field, be required to make his thoughts palatable and acceptable to the ordinary citizen? As a member of a great community which boasts of the exceptional freedom its citizens are permitted to enjoy, it seems to me that this question is not out of place. Years ago, when reading a work of Wassermann's called *The Maurizius Case,* I copied out a long passage from the mouth of one of his characters. It began something like this . . . "When I utter the word Europe I think of . . ." and here he proceeds to name the illustrious guiding spirits which laid the foundation of our civilization: poets, novelists, artists, thinkers, scientists, philosophers, religious leaders and so on. An exciting list, truly, since it embraced all those who made the Europe which has influenced us and the world. Reading this roster one cannot but be impressed with the number of leading spirits who, in giving of their best, were maligned, slandered, persecuted, imprisoned, tortured, executed, burned at the stake, anathematized. It would almost seem as if those who fought and died to insure our freedom, especially freedom of thought, were looked upon not only as enemies of society but as monsters.

The question in my mind is not how far one should be permitted to go in expressing oneself freely but how great is the gap, and how dangerous for the future of mankind, between the daring inspired by conviction and integrity and the conformity based upon inertia, stupidity, cowardice and hypocrisy? Are we here on earth to live like sheep, live in the herd, or to follow our own bent, our own conscience? Should we be fear-

ful of revolutionary thinking or welcome it? Should we act as our fathers and forefathers or as free and individually unique beings? And finally, is freedom itself to be interpreted and circumscribed by the few, the many, or by each man for himself?

Much has been said, during the course of the many trials which this book has provoked, of the danger to society, particularly to the young, which free circulation of the book involves. No one, to my knowledge, has yet pointed out a single instance where such has been the effect. And the book has had so far well over a million readers. We do know, on the other hand, the disastrous effects upon adults as well as young people of drugs, tobacco, alcoholic beverages, weapons, even automobiles. Is it possible that we can adapt to certain hazards and not others? Are certain words and expressions, even though commonly used, not to be employed in writing? Do they really constitute such a dangerous menace? Or is it not simply a matter of overcoming one more built in prejudice? We all know that when it comes to the classics a liberal use of what is called obscenity may be found. On what presumption is the freedom to read the classics permitted? Is time the test? If so, what hope is there of obtaining new classics?

I use the word classics deliberately. I regard *Tropic of Cancer* as such, a classic. Despite all that has been said against it, despite all the efforts to suppress it, it continues to make its way, to find more and more readers. It is now almost thirty years since its first publication, in Paris. It is still in its infancy, one might say. Previous suppression of its sale, in this country, did not prevent its being read. In my travels

about the country I have found copies which were smuggled in ten and twenty years ago in the homes of the most eminent and respectable people, including judges and ministers of the gospel. Moreover, should its sale in this country now be forbidden, those who still wish to have copies have only to write to publishers and booksellers abroad. Moreover, restriction of sale or of distribution does not of itself kill a book; on the contrary, evidence shows that such procedure only whets people's appetite. This being so, I fail to grasp the logic which animates those who wish to impede its sale.

As to its sale . . . I have been accused at times of having written it expressly to make money, that is to say, of having purposely used objectionable language in order to make appeal to certain readers and thus further its sale. Nothing, of course, could be further from the truth. I have never written anything expressly to make money. I have been relatively poor, for many years desperately poor, until the last few years. When the book was published in Paris my publisher neglected to obtain an American copyright, because it never occurred to him that it might one day be published in this country. One could hardly say that "we" conspired to bring out a book which twenty or thirty years later would become a best seller in the United States. (At the moment of writing this I am informed that a reputable English publisher will now attempt to bring the book out in England, which is the last barrier in the free world.)

I trust that it is apparent from the foregoing that I am not attempting to present myself as the author of a nice, clean, wholesome piece of work. I think of

this work as a sincere, honest effort which, in liberating me as a person and a writer, has somehow done the same for many others. I make no attempt to evaluate it as literature, since that is the task of posterity. But I feel certain that it is a work which will live no matter what is said or done about it. And even if I am "in the tradition", as most Europeans agree, I do not regard myself as a "monster" but as a sane and useful member of society. I have found life worth living, even when unbearably difficult, and I think this view of life permeates not only the book in question but all my work.

Sincerely,

/s/ Henry Miller

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 972

BRADLEY R. SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

On Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Petition.

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SUBJECT INDEX

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I.

Certiorari should be granted because of the importance of the question involved. The case transcends the fact that a state appellate court has sustained a criminal conviction of a bookseller for selling a book. The case presents outright the question whether under the First Amendment the shameful history of book banning can be permitted to be repeated as to a book which has achieved acclaim, both in this country and worldwide, as a work of high literary merit 2

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IN THE

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OCTOBER TERM, 1962

No. .....

BRADLEY R. SMITH,

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vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Brief Amicus Curiae of the American Civil Liberties Union of Southern California in Support of Petition.

This brief is filed with the consent of both parties pursuant to Rule 42(1) of this Court. The written consents are being forwarded to the Clerk of this Court concurrently herewith.

Interest of Amicus Curiae.

The American Civil Liberties Union of Southern California is a non-profit membership corporation dedicated to the preservation of, *inter alia*, the constitutional right to freedom of expression and due process of law. It believes that freedom of expression is indispensable under our constitutional system. It believes that the suppression of the book, Tropic of Cancer, as has been done here by criminally prosecuting and convicting a bookseller who, along with other books of all kinds, offers the book for sale to those members of the public

who desire to read it, violates fundamental rights guaranteed by the First and Fourteenth Amendments of the United States Constitution.

This is not the first time the ACLU has contended that the book cannot constitutionally be suppressed. More than a decade ago, then by the Northern California affiliate, and prior to this Court's clarification of the law in *Roth v. United States*, 354 U. S. 476, it was so contended (*United States v. Two Obscene Books*, 99 F. Supp. 760 [N. D. Cal. 1951], affd. sub. nom. *Besig v. United States*, 208 F. 2d 142 [C. A. 9 1953]).[1]

Hence this brief.

I.

Certiorari Should Be Granted Because of the Importance of the Question Involved. The Case Transcends the Fact That a State Appellate Court Has Sustained a Criminal Conviction of a Bookseller for Selling a Book. The Case Presents Outright the Question Whether Under the First Amendment the Shameful History of Book Banning Can Be Permitted to Be Repeated as to a Book Which Has Achieved Acclaim, Both in This Country and Worldwide, as a Work of High Literary Merit.

The dismal chronicle of writings which have been banned over the years[2] attests to the need for this

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[1]Since those cases, the United States has reversed the position it there took and has agreed through both the Customs Service (*United States v. Three Books*, Civ. No. 610685, U. S. D. C. E. D. N.Y., consent order of Aug. 15, 1961) and the Post Office Department (N.Y. Times, June 14, 1961) that the book is not obscene and cannot be denied entry into the country nor transmission through the mails.

[2]From Homer to Dante, to Galileo, to John Milton, to Jonathan

Court to grant the petition herein to make clear that under the First Amendment and under *Roth v. United States*, 354 U. S. 476, it cannot be permitted for the censor's ax to fell serious works of literary merit.

In *Roth*, this Court, admonishing that "the door barring federal and state intrusion into this area (of free speech and press) . . . (may be) opened only the slightest crack," (354 U. S. at 488) held that "(a)ll ideas having even the slightest redeeming social importance . . . have the full protection of the guaranties." (354 U. S. at 484). It is for this reason that it held obscenity not to be protected by the First Amendment, for "obscenity (is) utterly without redeeming social importance." (*ibid.*). Conversely, however, this also makes clear that a work cannot constitutionally be held to be obscene if it is not utterly without redeeming social importance. That is to say, if a work has *some* redeeming social importance, it cannot, in the very nature of things and according to the plain meaning of the English language, be utterly without redeeming social importance. Or, put another way: "utterly" means "utterly", and "utterly without" means precisely that.

This is clear not only as a matter of the definition of words,[3] but is likewise the meaning which the courts

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Swift and to Thomas Paine; to Goethe, Shelley and Heinrich Heine; to Charles Darwin and Harriet Beecher Stowe; to Walt Whitman, Flaubert and Ibsen; to Emile Zola, Anatole France and de Maupassant; to Theodore Driser, Upton Sinclair and James Joyce; to Eugene O'Neill, Aldous Huxley and William Faulkner. (See "Banned Books" by Ann Lyon Haight [R. R. Bowker Co., 2d Ed., 1955].)

[3]Webster's Third New International Dictionary defines utterly as "in an utter manner: to an absolute or extreme degree: to the full extent: absolutely, altogether, entirely, fully, thoroughly,

have given to the words "utter" or "utterly" when they have had occasion to construe those words when used in a statute or contract (*The Delaware Mutual Safety Insurance Company v. Gossler*, 96 U. S. 645, 24 L. Ed. 863, 866-868; *Insurance Company of Pennsylvania v. Duval* (Pa.), 8 Serg & R. 138, 148; *Moody v. Moody*, 118 Me. 454, 456, 108 Atl. 849; *Stewart v. Stewart*, 78 Me. 548, 552, 7 Atl. 473; *Pearsall v. Chapin*, 44 Pa. St. 9, 14, 8 Wright 9, 14).

It is submitted, therefore, that with the place "Tropic of Cancer" has made for itself as a work of serious literature, it simply cannot be held that "Tropic" is "absolutely", "altogether", "entirely", "fully", "totally", "completely" without redeeming social importance; to do so would defy all logic as well as law. Accordingly, the court below, in allowing suppression of the book, has permitted transgression against that most sensitive of constitutional rights: the public's right to read (*Cf. Smith v. California*, 361 U. S. 147, 154).

We understand that the question of the right of Tropic of Cancer to live has resulted in some 60 different litigations throughout the country.[4] This in it-

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totally". Black's Law Dictionary, 4th Edition, does not contain a definition of the adverb, utterly, but defines the adjective, utter, as "entire, complete, absolute, total".

[4]Among these are: *Attorney General v. The Book Named "Tropic of Cancer"*, ... Mass. ...., 184 N. E. 2d 328; *Haiman v. Morris*, No. 61 S. 19718, Superior Court, Cook County, Illinois; *People v. Pershina*, No. 16644, Municipal Court, Central Judicial District, Marin County, California; *Zeitlin v. Arnebergh*, 211 A. C. A. 31, 27 Cal. Rptr. 320; *Commonwealth v. Robins*, No. 3177, Court of Common Pleas, County of Philadelphia, Pennsylvania; *State v. Huntington*, No. 24657, Superior Court, Hartford County, Connecticut; *McAuley v. Tropic of Cancer*, No. 300-059, Circuit Court, Milwaukee County, Wisconsin; *State v. Goodhue*, No. 2223, Superior Court, Grafton County, New Hampshire; *Grove Press v. Calissi*, (D. N.J.); *People v. Rossett*, Kings County, New York.

self demonstrates the importance of this Court's hearing this case.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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